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In The

Supreme Court of the United States

October Term, 1984

JOE E. LUTJEHARMS, Commissioner of Education, et al.,

Petitioners,

vs.

GEORGE ROSE, as next friend of MARLA ROSE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James H. Monahan
623 Service Life Bldg.
Omaha, Nebraska 68102
(402) 346-1700

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Whether attorney fees may be awarded for due process challenges under the Education for All Handicapped Children act, EHA, and Section 1983 of the Civil Rights Act.

2. Whether attorney fees may be awarded under Education for All Handicapped Children Act, EHA, and section 1983, where the suit is not brought to a successful conclusion.

3. Whether fees awarded against state officials in their official capacities are barred by the Eleventh Amendment.

LIST OF PARTIES

JOE E. LUTJEHARMS, Commissioner of Education, *et al.*,

Petitioners,

v.

GEORGE ROSE, as Next Friend of MARLA ROSE,

Respondent.

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Each of the opinions of this case have been reported, to wit:

Monahan v. State of Nebraska, 491 F.Supp. 1074 (D. Neb. 1980).

Monahan v. State of Nebraska, 645 F.2d 592 (8th Cir. 1981).

Rose v. State of Nebraska, 530 F.Supp. 295 (D. Neb. 1981).

Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982).

Rose v. State of Nebraska, 575 F.Supp. 132 (D. Neb. 1983).

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STATEMENT OF THE CASE

A. Preliminary Statement

This is a response to a petition for writ of certiorari requested by the Attorney General of the State of Nebraska. The District Court award of fees was entered by the Honorable Richard E. Robinson. The Order was entered November 10, 1983. The memorandum which accompanied the Order has been printed at 575 F. Supp. 132. Other relief was denied because the District Court felt it did not have authority to determine damages or other relief. District Judge, Robert Denney originally entered a preliminary injunction, which was sustained as modified by the Eighth Circuit Court of Appeals, prohibiting the Nebraska Commissioner of Education from reviewing special education placement hearings. The fees awarded were based on this injunction.

B. Statement of Facts

Plaintiff/Respondent Rose, began this suit on March 6, 1980, with co-Plaintiff James H. Monahan, seeking in substance judicial determination of Plaintiffs' rights to free *appropriate* education of their children and as a class action for all other persons similarly situated. They also sought an injunction based on a due process claim.

The problem began for Monahan in June of 1979. His son, Daniel, at that time attended Madonna School, a private school for mentally retarded children. Under contract with Madonna, the Omaha School District paid for his education and received partial reimbursement for the costs from both State and Federal Funds. Daniel was unable to return to Madonna because the progress of Muscular Dystrophy had confined him to a wheel chair. Madonna could not accommodate a wheel chair.

Monahan requested that Omaha Public Schools contract with the Millard Public School, so that Daniel could attend the Development Center at George Norris School. Monahan believed that this was the appropriate educational placement. Omaha refused, saying they had a like program at Hartman School in their district. With the permission of the Millard School District, Daniel began school in the fall of 1979 at George Norris School. Monahan requested the Omaha School Board to consider contracting for Daniel, but was turned down in January of 1980. He then filed suit with Rose.

In the summer of 1978, Rose filed a request with the Nebraska Department of Education for review of the request by Omaha Public Schools, that his daughter, Marla, be placed at the Nebraska School for the Deaf. A hear-

ing officer was appointed and a hearing was held between March and May, 1979. The hearing officer concluded that Marla should be placed at the School for the Deaf. Pursuant to Nebraska law (Neb.Rev.Stat., Sec. 43-662 Reissue 1978) the Nebraska Commissioner approved the finding. In August, 1979, by agreement, Marla was placed in Monroe Junior High School of the Omaha Public Schools. Her parents withdrew her two weeks after the start of school, because the class as designed by the school district, could not benefit Marla, and was not as agreed. She later attended a private school. In March, 1980, Rose filed this suit in District Court. Rose, as did Monahan, challenged the authority of the Commissioner of Education to approve these hearings. Rose also challenged the Nebraska law setting the appeal time limit at thirty (30) days. Neb. Rev. Stat., Sec. 43-666 Reissue 1978. In May, 1981, Marla married Timothy Corrado, and now carries on the suit in her own name, even though she has moved from the Omaha School District. She is referred to in this brief by her maiden name. She completed school over a year ago.

After hearing on the request for preliminary injunction, District Judge Robert V. Denney found that the Court had jurisdiction, even though Monahan had not exhausted his administrative remedies. He also found that he could recover damages under the law. Judge Denney denied Monahan's request for temporary injunction only, because there was no immediate harm. He found, however, that State law authorized the Commissioner of Education a part in the review process, and that such authorization was contrary to Federal law. He did enter an injunction for Plaintiff Rose against the Commissioner, because Rose would otherwise suffer irreparable harm.

The Defendants/Petitioners appealed to Eighth Circuit Court of Appeals and Monahan cross-appealed. The Appeals Court denied Monahan a temporary injunction, but found that he had jurisdiction without exhausting his administrative remedies. The Court found the Commissioner's duties under Nebraska law, Sec. 43-662, Neb. Rev. Statutes, Reissue 1978, were probably in violation of Federal law. 20 U.S.C. 1415 (b) (2). The Appeals Court modified but did continue the injunction for Rose. The Eighth Circuit Court of Appeals also agreed that Rose had four (4) years to appeal the administrative hearing to District Court, and that hearing would be by Trial De Novo, and not merely on the record of the hearing officer. The Court stated that Sec. 43-666, Neb. Rev. Stat., Reissue 1978, was in violation of Federal law.

Finally, the Court of Appeals suggested that the District Court might adjudicate all matters at the District Court level without sending Monahan and Rose back to an administrative hearing.

Due to the death of District Judge Robert Denney, this case was reassigned to District Judge Richard Robinson. After a hearing, Judge Robinson dismissed the injunctive relief as moot. He dismissed the rest of the case without prejudice because he felt he lacked jurisdiction to determine it.

Appeal was taken to Eighth Circuit Court of Appeals, which in 1982 upheld the dismissal, but did find that attorney fees were due on the Rose side of the case only, and remanded same to District Court for determination. Rose requested $42,870.00 in fees, costs and $12,-468.64 for fees and costs of the administrative hearing. The State of Nebraska, its officials, and the Omaha School

District offered no evidence of value of fees, but maintained that no fee should have been awarded. The District Court denied fees for the administrative hearing and all costs of this court action. The Court did award Rose attorney fees of $9,540.00 against all defendants.

Rose appealed to the Eighth Circuit Court of Appeals. Attorney Quintin Hughes was allowed to withdraw because he moved from Omaha to Atlanta, Georgia, and Attorney James H. Monahan entered the case as attorney for Mr. Rose. Defendants cross-appealed.

The Eighth Circuit Court of Appeals affirmed the $9,540.00 in fees but only as the Commissioner of Education and the State Board of Education members in their official capacities. These defendants filed a petition for a Writ of Certiorari in this Court.

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REASONS IN OPPOSITION TO GRANTING THE PETITION

I.

A Determination By A Circuit Court Of Appeals That Attorney Fees Are Allowable Against Defendants, Not Timely Appealed To The Supreme Court Is Res Judicata As To The Defendants.

On August 30, 1982, the Eighth Circuit Court of Appeals entered an order dismissing Plaintiff/Respondent's case in general as moot, but did make a finding that attorney fees were due under 42 U.S.C. 1983 & 1988. The Court stated:

> "A remand is appropriate for the limited purpose of determining the proper amount of attorney fees and costs to be limited to those incurred up through the decision by the Court on the first appeal."
>
> *Monahan v. State of Nebraska,* 687 F.2d 1164, p. 1172.

None of the Defendants/Petitioners sought review by the Supreme Court. Plaintiff/Respondent did so unsuccessfully. *Rose v. Nebraska,* 103 S. Ct. 1252 (1983). The case then returned to the District Court where fees of $9,540.00 were awarded. *Rose v. State of Nebraska,* 575 F. Supp. 132 (D. Neb. 1983) affirmed at *Rose v. State of Nebraska,* 748 F.2d 1258 (8th Cir. 1984). Defendants/Petitioners do not challenge the amount of fees awarded, but only state that fees are not available. Their failure to timely appeal the determination that fees were due, makes the matter Res Judicata.

II.

Attorney Fees Are Available For Suits Brought Under The Education Of The Handicapped Children Act, EHA, And Section 1983 Where Plaintiff Must Maintain A Due Process Challenge To A State Law That Is Contrary To Federal Law.

Attorney fees awarded Plaintiff/Respondent, Rose, were based on the fact that he was successful in enjoining the Nebraska Commissioner of Education from illegally participating in special education placement hearings. Nebraska law at the time, was contrary to Federal law. This required Rose to file a due process challenge to force the State of Nebraska to grant him his due process rights due under the EHA law.

This Court denied attorney fees for suits brought under the EHA in *Smith v. Robinson,* — U.S. —, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984) where the fee was based on *independent equal protection claim.*

In *Smith,* this Court indicated that fees awarded on an *independent due process claim* as in this case, are justified. The Court stated:

> On the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme. Under either the EHA or § 1983, a plaintiff would be entitled to by-pass the administrative process by obtaining injunctive relief only on a showing that irreparable harm otherwise would result. See *Monahan v. Nebraska,* 645 F.2d 592, 598-599 (CA8 1981). And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due.
>
> *Smith v. Robinson,* 104 S. Ct. at 3471, footnote 17, second paragraph.

Section 1415(e) (2) of the act requires the Court to grant "appropriate relief." The award of attorney fees for a due process claim merely furthers the Congressional intent of EHA and helps to ensure that states will follow Federal Law.

III.

Fees Are Available For Due Process Suits Brought Under The Education For Handicapped Children Act, EHA, And Section 1983 Even If The Case Is Not Brought To A Successful Conclusion.

The Eighth Circuit Court of Appeals found that attorney fees were due in this case, even though it was not brought to a successful conclusion.

The Court stated:

> "It does not matter that the constitutional or 1983 ground was not actually reached, and that the complaint prevailed, to the extent that he did at all, on EAHCA ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the Plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the Court to reach the Sec. 1983 claim and award of fees is nevertheless appropriate."
>
> *Monahan v. State of Nebraska, supra,* 687 F.2d at 1172.

The rule is consistant with *Hensley v. Eckerhart,* 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983). In *Hensley* the Supreme Court set out this rule:

> "Where a lawsuit consists of related claims, a plaintiff who won substantial relief, should not have his attorney fees reduced simply because the district court did not adopt each contention raised."
>
> *Hensley v. Eckerhart,* 103 S.Ct. at 1943.

The principal was first recognized in *Wilderness v. Alyeska Pipeline Service Company,* 495 F.2d 1026 (D.C. CA 1974). Similar to our case, Plaintiffs in *Wilderness* initially prevented issuance of permits for construction of the Trans-Alaska Oil pipeline. This because the Secre-

tary of the Interior had not complied with the statutes. The litigation became moot when the law was changed and the permits issued. The Court of Appeals of the District of Columbia nevertheless awarded fees against *Alyeska,* even though the suit was not brought to a successful conclusion. The ruling was reversed by the Supreme Court on other grounds. (421 US 420, 44 L.Ed.2d 141, 95 S.Ct. 1612, 1975). The Supreme Court agreed that the litigation need not be brought to a successful conclusion to award fees. The Court recognized the theory of spreading costs to the benefiting class, but felt that awarding fees against the pipeline company, a private corporation, would not fulfill this principle.

In our case, awarding fees would serve to spread the costs among the benefiting class, the citizens of the State of Nebraska, and the Omaha School District, and in particular, the handicapped persons of the State and District. Terminating State laws that violate Federal laws for the education of the handicapped is certainly a benefit to the class and vindicates a strong congressional policy of high priority concerning the education of the handicapped. Even where the case was settled and dismissed by agreement, attorney fees were awarded against the State of Nebraska by The Eighth Circuit Court of Appeals to a nonprofit Legal Aid Association. *Woe v. Nebraska State Department of Public Welfare,* 608 F.2d 302 (8th Cir. 1979).

The injunction obtained did order the Commissioner of Education not to be involved in special education review hearings and ordered the School District to keep Rose's daughter Marla in a facility operated by the District, rather than being placed at the Nebraska School for

the Deaf *Monahan v. State of Nebraska, supra,* 491 F. Supp. a 1094. The Court of Appeals modified the injunction as to the new administrative hearing suggesting that due to passage of time, it would be better to handle the placement hearing at the District Court level. *Monahan v. State of Nebraska, supra,* 565 F.2d at 599. Plaintiff Rose did obtain all he sought in the way of injunctive relief and this relief certainly was substantial.

Viewed from the Private Attorney General theory, Plaintiff Rose won a substantial victory when the District Court declared two Nebraska statutes were in violation of Federal law. The suit is at least partially responsible for change in State law that illegally permitted the Commissioner of Education to review special education placement hearings. (Sec. 43-662, Neb. Rev. Stat., Reissue 1978)

The District Court also found that Sec. 43-666, Neb. Rev. Stat., Reissue 1978, was flawed in that it allowed court review of the due process hearings only on the record. Federal law, 20 USC 1415 (e) (2) required a *de novo* hearing in the District Court. *Monahan v. State of Nebraska, supra,* 491 F. Supp at 1084. As a result of this, the State of Nebraska changed the law in 1982 to allow the *de novo* hearing. Sec. 43-666, Neb. Rev. Stat., Reissue 1984. Prior to the District Court ruling, no efforts had been made to change this statute. Both changes were a substantial benefit to all handicapped children and other citizens of the State and School District, in that it allowed special education due process hearings that were in compliance with Federal law.

Rose had originally sought certification of the case as a class action, but the matter became moot before this could be done.

IV.

An Award Of Attorney Fees Against State Officials In Their Official Capacities After Injunctive Relief Is Granted Is Not Barred By The Eleventh Amendment.

Defendants/Petitioners seek to block any award of fees based on the Eleventh Amendment:

> The Eleventh Amendment provides:
>
> The Judicial power of the United States shall not be construed to extend to any suit in law of equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."

Defendants/Petitioners cite *Brandon v. Holt,* — US —, — L.Ed. 2d —, 105 S. Court 873 (1985), *Pennhurst State School and Hospital v. Halderman,* — US —, 79 L.Ed. 2d 67, 104 S. Ct. 900 (1984) and several other cases. However, these cases primarily hold that retroactive damages cannot be awarded against a state. In contrast, the Supreme Court found that fees were available against state officials in *Hutto v. Finney,* 437 US 678, 98 S. Ct. 2565, 57 L.Ed. 522 (1978). The Court stated:

> The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. See *Missouri v. Iowa,* 7 How. 660, 681; *North Dakota v. Minnesota,* 263 U. S. 583 (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.
>
> *Hutto v. Finney,* 437 U.S. at 695.

This rule was further explained by the Court in a case cited by Defendants/Petitioners, *Brandon v. Holt, supra,* 105 S. Ct. at 878:

> *"Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), was an action against state officials rather than municipal officers. Notwithstanding our express recognition that an order requiring the Arkansas Commissioner of Corrections to pay the plaintiff's counsel fees would be satisfied with state funds, we sustained the order against an Eleventh Amendment challenge. We considered it obvious that the State would pay the award because the defendants had been sued in their 'official capacities.' "

As stated earlier, fees can be awarded for due process claims against a state (as opposed to equal protection claims) by the Education to All Handicapped Children Act. E.H.A. because section 1415 (e) (2) of the act allowed the court to award "appropriate relief" where necessary. Fees are also available in Section 1983.

Defendant Petitioners argue that fees may not be awarded against state officials in their official capacities because the State of Nebraska and its Board of Education were dismissed from the fee award by the Eighth Circuit Court of Appeals. This was adequately answered in *Hutto v. Finney, supra,* 437 U.S. at 699. The Court stated:

> "Finally, the Attorney General argues that, even if attorney's fees may be awarded against a State, they should not be awarded in this case, because neither the State nor the Department is expressly named as a defendant. Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State."

Rose named the State of Nebraska and its Board of Education as defendants and the Nebraska Attorney General's office has defended them as well as other state officials throughout the proceedings. There should be no difference for the award of fees whether the state and its administrative agency were not named as defendants as in *Hutto* or merely dismissed from the fee award as in the present case.

CONCLUSION

Rose is entitled to the attorney fees of $9,540.00 awarded him when he obtained an injunction against state officials under a due process claim. The state officials were attempting to enforce state law that was contrary to federal laws, regarding education of handicapped children. The request writ for certiorari should not be granted.

Respectfully submitted,

George Rose, as next Friend of
Marla Rose

By James H. Monahan, Attorney for
Respondent
623 Service Life Bldg.
Omaha, Nebraska 68102
(402) 346-1700

Attorney for Respondent